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No. 93-360

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JIMMY RAY NOBLES,
Petitioner,

v.

THE STATE OF NORTH CAROLINA,
Respondent.

On Petition For A Writ of Certiorari to the Supreme Court of North Carolina

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BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner is the owner of private commercial property known as West End Seafood in Greenville, North Carolina, which is licensed as a fish dealership by the North Carolina Division of Marine Fisheries pursuant to N.C. Gen. Stat. § 113-156. As a licensed fish dealer, Petitioner brings fish to his place of business for sale.

On Tuesday, March 6, 1990, at about 10:15 a.m., North Carolina Division of Marine Fisheries Inspectors Jim Kelly and A. J. Rucienski made a request to inspect fish

located on the commercial premises of West End Seafood. Petitioner refused to allow Officers Kelly and Rucienski to inspect the fish. The officers subsequently obtained a search warrant and issued Petitioner a misdemeanor citation for unlawfully refusing to allow authorized inspection of fish located at his licensed commercial fish house, in violation of N.C. Gen. Stat. § 113-136(k). That statute makes unlawful, *inter alia*, the refusal to allow inspection of fish which are reasonably believed to be possessed incident to activities regulated under state fisheries laws.

The case was tried on February 11, 1991, before state Superior Court Judge William C. Griffin, Jr., on trial *de novo* from Petitioner's verdict of guilty on the misdemeanor charge, entered in the state District Court on July 11, 1990. The trial court granted Petitioner's pre-trial Motion To Dismiss the charge on the grounds that N.C. Gen. Stat. § 113-136(k) on its face violates the Fourth Amendment of the United States Constitution, and its counterpart in the Constitution of North Carolina, N.C. Const. art. I, § 20. Respondent appealed. The North Carolina Court of Appeals reversed in a divided opinion, *State v. Nobles*, 107 N.C. App. 627, 422 S.E.2d 78 (1992), concluding that the statute met the requirements for warrantless administrative inspections established by this Court in *New York v. Burger*, 482 U.S. 691 (1987); *Donovan v. Dewey*, 452 U.S. 594 (1981) and *United States v. Biswell*, 406 U.S. 311 (1972). Judge K. Edward Greene dissented solely on the question of whether the statute was adequately limited in "time, place and scope" so as to sufficiently restrict the inspecting officer's discretion under *Burger*. *State v. Nobles*, 107 N.C. App. at 641-44,

422 S.E.2d at 87-89. Petitioner appealed of right to the Supreme Court of North Carolina pursuant to N.C. Gen. Stat. § 7A-30(2). State law limited the scope of review in the Supreme Court of North Carolina to the subject matter of the dissent in the state Court of Appeals. *State v. Hooper*, 318 N.C. 680, 681-82, 351 S.E.2d 286, 287 (1987).[1] On June 4, 1993, the North Carolina Supreme Court affirmed the state Court of Appeals in a *per curiam* decision, upholding the statute against Petitioner's facial challenge. *State v. Nobles*, 333 N.C. 787, 429 S.E.2d 716 (1993).

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

Allowing the writ of certiorari is not appropriate in this case. The North Carolina Supreme Court correctly applied this Court's decision in *New York v. Burger*, 482 U.S. 691 (1987), in determining that N.C. Gen. Stat. § 113-136(k) does not, on its face, violate the Warrant Clause of the Fourth Amendment. The decision below is also consistent with the opinions of United States Courts of Appeal in those Circuits which have construed similar state and federal acts, and with state appellate courts in a number of jurisdictions. In addition, the Petition omits that the statute is before

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[1] Accordingly, this is the only question which the Petition may properly present to this Court, and Petitioner's attempt to enlarge the issues should be rejected. Under this Court's practice commonly referred to as the "not pressed or passed upon" rule, certiorari should not be granted as to issues raised for the first time in the Petition and should only be granted, if at all, as to those questions which formed the basis of the state Court of Appeals' dissent. *Heath v. Alabama*, 474 U.S. 82 (1985).

this Court solely on a facial challenge, as that was the basis of the trial court's order and the only issue presented to the state Supreme Court and the state Court of Appeals. As a result, the Petitioner does not address his claim in light of the proper standard of review established by this Court for a facial challenge of a state statute. Petitioner cannot meet the requirement that he show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). For these reasons, the Petitioner presents no grounds to this Court for plenary review, and the writ should be denied.

I. THE PETITION SHOULD BE DENIED BECAUSE THE NORTH CAROLINA SUPREME COURT CORRECTLY DECIDED THAT N.C. GEN. STAT. § 113-136(K), AUTHORIZING WARRANTLESS ADMINISTRATIVE INSPECTIONS OF LICENSED COMMERCIAL FISH DEALERSHIPS, SUFFICIENTLY LIMITS THE DISCRETION OF INSPECTING OFFICERS SO AS TO SURVIVE A FACIAL CHALLENGE UNDER THE FOURTH AMENDMENT.

Petitioner presents a facial challenge to N.C. Gen. Stat. § 113-136(k) under the Fourth Amendment of the United States Constitution. The statute authorizes, *inter alia*, Fisheries Inspectors employed by the North Carolina Division of Marine Fisheries to conduct warrantless administrative inspections of fish located in commercial fish dealerships. The pertinent portion of the statute in question reads:

> It is unlawful to refuse to exhibit upon request by any inspector, protector or other law enforcement officer any item required by any law or rule as to which inspectors or protectors have enforcement jurisdiction. The items that must be exhibited include boating safety or other equipment or any license, permit, tax receipt, certificate, or identification. It is unlawful to refuse to allow inspectors, protectors, or other law enforcement officers to inspect weapons, equipment, fish, or wildlife that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction. (Emphasis added.)

N.C. Gen. Stat. § 113-136(k). Although the paragraph relates also to inspection of licenses and permits, and to unrelated items wholly within the jurisdiction of Wildlife Protectors employed by the North Carolina Wildlife Resources Commission, such as hunting weapons, wildlife, and boating safety equipment, the trial court struck the entire paragraph as facially invalid.

Although Petitioner was charged under N.C. Gen. Stat. § 113-136(k), his state appeal did not challenge the statute as applied to him, but instead contended that the act is unconstitutional on its face, as not sufficiently limiting the discretion of inspecting officers under the Fourth Amend-

ment.[2] As the Petition does not specify the appropriate standard of review for a facial challenge, Respondent briefly sets forth the applicable standard.

A. PETITIONER DOES NOT MEET THE STANDARD OF REVIEW FOR A FACIAL CHALLENGE.

This Court has enunciated the standard of review for a facial challenge to a legislative enactment as follows:

> A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid. The fact that the [statute] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an "overbreadth" doctrine outside the limited context of the First Amendment.

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[2] The state Court of Appeals framed the issue thus:

> The only issue presented is whether the trial court decided correctly that N.C. Gen. Stat. § 113-136(k) on its face violates the constitutional right to be free from unreasonable searches and searches of commercial premises.

107 N.C. App. at 628, 422 S.E.2d at 79, *aff'd per curiam*, 333 N.C. 787, 429 S.E.2d 716 (1993).

United States v. Salerno, 481 U.S. 739, 745 (1987); *applied in Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990). "In particular, facial challenges of a licensing or regulatory scheme are disfavored. '[W]hen considering a facial challenge it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program.'" *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216 (1975).

Petitioner's facial challenge meets neither the standard for overbreadth, nor that for vagueness. The Petition does not allege that the statute reaches a substantial amount of constitutionally protected conduct under the First Amendment of the United States Constitution; therefore, no overbreadth challenge is presented. *Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982). The Petition also fails to satisfy this Court's criteria for questions of facial vagueness:

> [t]he court should then examine the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of it applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. [footnote omitted.]

Id., at 494-95.

By refusing to allow inspection of fish being sold at his licensed fish house, Petitioner's conduct was clearly proscribed by the statute. Petitioner improperly seeks this Court's review of the statute's potential effect on persons who may never become subject to its provisions. It is well-settled that a defendant in a criminal prosecution can challenge the constitutionality of the law under which he is charged only on the basis that the statute unconstitutionally abridges his rights, not that it might conceivably be applied to others. *Parker v. Levy*, 417 U.S. 733, 756 (1974). Petitioner lacks standing to attack the statute beyond the context of warrantless inspections of fish on the commercial premises of licensed fish dealers, as "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand." *Village of Hoffman Estates*, 455 U.S. at 495, n.7, *quoting United States v. Mazurie*, 419 U.S. 544, 550 (1975).

The Petition does not reflect that N.C. Gen. Stat. § 113-136(k) is "invalid *in toto* -- incapable of any valid application" per *Village of Hoffman Estates*, 455 U.S. at 494, n.5; therefore, review is not warranted. As Petitioner fails to show that no set of circumstances exists under which the enactment would be valid, the state Supreme Court properly concluded that the statute does not facially violate the Fourth Amendment prohibition against unreasonable searches and seizures, and the writ should be denied.

B. N.C. GEN. STAT. § 113-136(K) SATISFIES FOURTH AMENDMENT STANDARDS FOR WARRANTLESS ADMINISTRATIVE INSPECTIONS OF CLOSELY REGULATED INDUSTRIES.

While private businesses carry an expectation of privacy and freedom from unreasonable governmental searches under the Fourth Amendment, commercial property has a diminished, reasonable expectation of privacy as compared to private dwellings. *Donovan v. Dewey*, 452 U.S. 594 (1981). As the warrant and probable cause requirements have lessened application in the context of industries which are "closely regulated," because of the substantial public or governmental interest at stake,[3] this Court in *New York v. Burger*, 482 U.S. 691 (1987), recognized that warrantless administrative inspections of such industries pass constitutional challenge where the following requirements are met:

1) There must be a a substantial public or governmental interest requiring the regulatory scheme;

2) Warrantless inspections must be necessary to further the regulatory scheme; and

3) The inspection program must provide a constitutionally adequate substitute

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[3] *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970).

> for a warrant issuance: "it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers."

Id., 482 U.S. at 702-3.

In the decision affirmed by the state Supreme Court, the state Court of Appeals unanimously concluded that "[t]he first two prongs of the [three-pronged] *Burger* test are satisfied easily [by the statute]." 107 N.C. App. at 631, 422 S.E.2d at 81 (majority opin.); 107 N.C. App. at 642, 422 S.E.2d at 82 (dissent. opin.). First, the court properly found the requisite "substantial governmental interest" in fisheries regulation under *Burger's* first prong. Thus, the industry is "closely regulated." Proceeding to *Burger's* second prong, the court then correctly found that warrantless inspections further the state's regulatory scheme to protect those interests. The court correctly recognized these established tenets on the basis that 1) fish are "highly perishable products" transported and disposed of easily; 2) the fishing industry is "highly variable," thus procuring a warrant is often impractical; and 3) imposing a warrant requirement would frustrate the effectiveness of the regulatory scheme. 107 N.C. App.

at 632-3, 422 S.E.2d at 82, *aff'd per curiam*, 333 N.C. 787, 429 S.E.2d 716.[4]

The lone federal question presented to the state Supreme Court was whether the statute was adequately limited in "time, place and scope" so as to sufficiently restrict the inspecting officer's discretion under *Burger*. 107 N.C. App. at 642-44, 422 S.E.2d at 88-9 (dissent. opin.). The third prong of the *Burger* test requires that warrantless inspections be limited and regular in nature so as to adequately serve as a procedural substitute for a warrant, by limiting the inspector's discretion in time, place and scope. *Burger*, 482 U.S. at 703. The state Supreme Court correctly concluded that the statute satisfies those requirements.

C. N.C. GEN. STAT. § 113-136(K) SATISFIES THE TIME, PLACE AND SCOPE RESTRICTIONS OF *NEW YORK V. BURGER*, 482 U.S. 691 (1987).

In *New York v. Burger*, this Court explained the requirements for "time, place and scope" limitations in a footnote in the opinion:

> . . . While such limitations, or the absence thereof, are a factor in an analysis of the adequacy of a particular statute, they are not

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[4] The state court opinion is consistent with those Circuits which have addressed similar questions related to regulation of fisheries resources. *See Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991); *Lovgren v. Byrd*, 787 F.2d 857, 866 (3rd. Cir. 1986); *U.S. v. Kaiyo Maru*, 699 F.2d 989, 996 (9th Cir. 1983).

> determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of the inspection officers. Indeed, we have approved statutes authorizing warrantless inspections even when such statutes did not establish a fixed number of inspections for a particular time period. And we have suggested that, in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme.

Burger, 482 U.S. at 711, n.21 (citations omitted).

The Petition, without citation of other authority, contends that N.C. Gen. Stat. § 113-136(k) "fails the *Burger* analysis" for eight reasons. (Petition, pp. 16-18). Petitioner's claims are inappropriate for this facial challenge; while they speculate as to possible unconstitutional operation of the statute, the Petition fails to show that no set of circumstances exists under which the statute would be valid. *United States v. Salerno*, 481 U.S. at 745. Respondent will examine these broadside attacks *seriatim*, establishing that each affords no basis for review by this Court.

First, Petitioner contends the statute lacks "meaningful restrictions as to place, specifically licensed premises or vehicles." (Petition, p. 16). This contention is meritless, as the statute restricts the inspection to only those places where the items enumerated, i.e., fish or equipment, are possessed incident to regulated activity, such as in a fish house, or aboard a fishing vessel. Even then, a warrant must be

obtained to inspect within dwelling curtilage or vessel living quarters, as N.C. Gen. Stat. § 113-136(1) prohibits warrantless inspections therein. N.C. Gen. Stat. §§ 113-136(f) and (g), not challenged below, separately govern vehicle stops.

Several United States Circuit Courts of Appeal reviewing warrantless inspections in the context of fisheries regulation have reached the same result as the Supreme Court of North Carolina.[5] For example, the Third Circuit Court of Appeals upheld a regulation adopted pursuant to the Magnuson Fisheries and Conservation Management Act, 16 U.S.C. § 1801, *et seq.*, a federal fisheries conservation statute, authorizing warrantless inspections at "those times when and those places where groundfish may be found," as sufficiently limiting the discretion of inspecting officers. *Lovgren v. Byrd*, 787 F.2d 857, 867 (3d Cir. 1986). In *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991), the First Circuit held that under *Burger* "the governing statute need not in all circumstances prescribe exhaustive restrictions limiting the target, time and place of the inspection." 949 F.2d at 498. Because of the highly variable nature of the fishing industry, these courts have recognized that it is simply not practical for the legislature to enumerate every

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[5] The United States Court of Appeals for the Fourth Circuit has upheld warrantless inspections in the following cases: *McLaughlin v. A.B. Chance Co.*, 842 F.2d 724 (4th Cir. 1988) (warrantless inspection of OSHA records upheld); *Gallagher v. City of Huntington*, 759 F.2d 1155 (4th Cir. 1985) (warrantless inspection of precious stones and metals dealer upheld); *Marshall v. Sink*, 614 F.2d 37 (4th Cir. 1980) (warrantless inspection of coal mine under Federal Coal Mine Health and Safety Act upheld).

conceivable place where inspection may be appropriate. As previously noted, Petitioner does not even suggest that Respondent improperly applied the statute to the inspection of fish at his licensed commercial fish house.

Second, Petitioner contends the inspections "are not restricted to the regulated industry as anyone reasonably believed to possess marine fisheries resources is subject to the search authority of any law enforcement officer." (Petition, p. 17). This statement is inaccurate for several reasons.

Petitioner's description of the authority of Fisheries Inspectors is misleading. The scope of an inspection by a Fisheries Inspector under N.C. Gen. Stat. § 113-136(k) is expressly limited to "weapons, equipment, fish, or wildlife that the officer reasonably believed to be possessed incident to an activity regulated by any law or rule as to which inspectors . . . have enforcement jurisdiction." The enforcement jurisdiction of inspectors is restricted by N.C. Gen. Stat. § 113-136(b) and does not include general law enforcement powers. Thus the scope of authorized warrantless inspection under the challenged provision is specifically limited to equipment and fish possessed incident to regulated activities,[6] as inspectors do not have subject matter jurisdiction over wildlife and weapons under N.C. Gen. Stat. § 113-136(b). Petitioner does not contend that the scope of the

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[6] Operation of a fish dealership licensed under N.C. Gen. Stat. § 113-156 is a regulated activity within the meaning of N.C. Gen. Stat. § 113-136(k).

inspection he refused was outside the ambit of the statute, or that the statute violates the Fourth Amendment by authorizing inspection of fish sold at commercial fish houses. The First, Third and Sixth Circuits have approved similar limitations on the scope of inspections. *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991); *Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986); *United States v. Dominquez-Prieto*, 923 F.2d 464 (6th Cir. 1991), *cert. denied,* 111 S. Ct. 2063 (1991).[7]

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[7] Similar restrictions on the scope of inspections have been upheld by state appellate courts as adequately limited. *Tallman v. Department of Natural Resources*, 421 Mich. 585, 630, 365 N.W.2d 724, 745 (1984) (upheld Michigan statute limiting the scope of authorized warrantless inspections to a licensee's "fishing operations." Remanded on question of whether authorizing inspections "at any time" was necessary to carry out the purposes of the enactment. 421 Mich. at 633-34, 365 N.W.2d at 746); *Betchart v. California Dept. of Fish and Game*, 158 Cal. App. 3d 1104, 1110, 205 Cal. Rptr. 135, 139 (1984) (upheld warrantless entries on private lands by game wardens "where game is present and hunting occurs"); *State of Oregon v. Westside Fish Co.*, 31 Or. App. 299, 302-303, 570 P.2d 401, 402 (1977) (approved warrantless inspection of "all canneries, cold storage houses, packing establishments, business places, boats, fishing gear, and all property used in the taking, processing and packing of food fish, for the purpose of enforcing the commercial fishing laws"); *State of Florida v. Casal*, 410 So. 2d 152 (Fla. Sup. Ct. 1982) (warrantless inspection of fishing vessel upheld); *People v. Harbor Hut Restaurant*, 147 Cal. App. 3d 1151, 196 Cal. Rptr. 7 (1983) (warrantless inspection of wholesale fish dealer's unlocked walk-in cooler upheld); *State of Wisconsin v. Erickson*, 101 Wis. 2d 224, 303 N.W.2d 850 (1981) (warrantless search of truck transporting fish upheld); *Exotic Coins, Inc. v. Beacom*, 699 P.2d 930 (Colo.), *app. dismissed*, 474 U.S. 892 (1985) (bare authorization for inspections construed to authorize warrantless inspections); *Mendez v. Arizona Bd. of Pharmacy*, 129 Ariz. App. 89, 628 P.2d 972 (1981) (warrantless inspection of pharmacy records upheld); *State v. Santiago*, 218 N.J. Super. 427, 527 A.2d 963 (1986) (warrantless inspection of licensed pesticide applicator upheld);

(continued...)

Third, Petitioner contends "[t]here are no temporal restrictions" in the statute. (Petition, p. 17). That assertion is groundless, as N.C. Gen. Stat. § 113-136(k) satisfies *Burger* by restricting the time of authorized inspection to when fish or equipment are possessed incident to regulated activities, such as when fish are offered for sale by a licensed fish dealer. There is no dispute among the Circuits which have considered time restrictions for warrantless administrative inspections. This Court denied certiorari in *United States v. Dominquez-Prieto*, 923 F.2d 464 (6th Cir. 1991), *cert. denied*, 111 S. Ct. 2063 (1991), which upheld a state statute authorizing Tennessee Public Service Commission enforcement officers to stop motor carriers and inspect their freight "upon reasonable belief that any vehicle is being operated in violation of any provision of this part." The Sixth Circuit Court of Appeals found the only material distinction between the Tennessee statute and the inspection

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[7](...continued)
Kim v. Dolch, 173 Cal. App. 3d 736, 219 Cal. Rptr. 248 (1985) (warrantless inspection of massage parlors upheld); *People v. Firstenberg*, 92 Cal. App. 3d 570, 155 Cal. Rptr. 80 (1979), *cert. denied*, 444 U.S. 1012 (1980) (warrantless inspection of skilled nursing facility upheld); *Matter of Dept. of Environmental Protection, Division of Water Resources of New Jersey*, 177 N.J. Super. 304, 426 A.2d 534 (1981) (state may condition wastewater discharge permit for chemical plant to allow warrantless inspections); *Hosto v. Brickell*, 265 Ark. 147, 577 S.W.2d 401 (1979) (warrantless inspection of pharmacist's records upheld); *State of New Jersey v. Bromell*, 251 N.J. Super. 85, 596 A.2d 1105 (1991) (warrantless search of auto-body repair facility upheld); *State of New Jersey v. Turcotte*, 239 N.J. Super. 285, 571 A.2d 305 (1990) (warrantless inspection of off-track stable housing licensed harness racing horses upheld).

scheme in *Burger* was the limitation on time, but determined that the Tennessee provision was nonetheless consistent with *Burger*, for the reason that "such a limitation would, of course, render the entire inspection scheme unworkable and meaningless. Trucks operate twenty-four hours a day and the officers must, necessarily, have the authority to conduct these administrative inspections at any time. Thus, this difference between the statutes is inconsequential." *Id.* at 470.[8]

The logistical problems in establishing a successful inspection program for the fishing industry throughout a state with extensive inland waters and a long sinuous coastline, such as North Carolina, are immense. A meaningful inspection system must involve warrantless searches in many circumstances. There is no other effective temporal alternative for an industry with such unpredictable hours of operation. For example, fish houses often pack and ship when the highly perishable fish become available. The record below shows that the inspection at issue was attempted during

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[8] Cases involving facial challenges in other circuits reached like results. *S & S Pawn Shop, Inc. v. City of Del City*, 947 F.2d 432, 438-39 (10th Cir. 1991) (upheld Oklahoma statute authorizing warrantless inspections of pawnshops at a "reasonable time" against a facial challenge); *Pollard v. Cockrell*, 578 F.2d 1002 (5th Cir. 1978) (upheld municipal ordinance purporting to leave the time of inspections of massage parlors to the discretion of police against a facial challenge. "Although it is conceivable that searches with great frequency could be unreasonable, the ordinance on its face does not authorize unreasonable searches.") *Id.* at 1015.

regular business hours, at about 10:15 a.m., on a Tuesday. Petitioner does not contend that time was unreasonable.

Fourth, Petitioner contends that the statute does not provide adequate notice to the affected population, which he describes as the general public. This concern is addressed together with his eighth contention that the inspections are not required to be conducted with such regularity as to place the public on notice. (Petition, pp. 17, 18). Neither has merit.

The state's regulatory scheme for the commercial fishing industry, which includes N.C. Gen. Stat. §§ 113-136(k) and 113-156 (fish dealer licensing), meets *Burger's* requirement that the statute place the regulated community on notice that its commercial property will be subject to periodic inspections. 107 N.C. App. at 633-35, 422 S.E.2d at 82-83 (majority opin.); 107 N.C. App. at 642, 422 S.E.2d at 88 (dissent. opin.).[9] Dealing in or selling fish is regulated pursuant to N.C. Gen. Stat. § 113-156, which requires a license from the state. The opinion below correctly concluded that by applying for and accepting a license to conduct a closely regulated business activity, commercial fish dealers like Petitioner have a reduced expectation of privacy and impliedly consent to periodic inspections of fish being sold on the premises as a regular component of the enforcement

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[9] Although Petitioner attempts to raise this issue, the question was not before the state Supreme Court, as it was not the subject of dissent in the state Court of Appeals; therefore, it is not properly the subject of this Petition. *Heath v. Alabama*, 474 U.S. 82 (1985).

scheme. 107 N.C. App. at 635-37, 422 S.E.2d at 83-84, *aff'd per curiam*, 333 N.C. 787, 429 S.E.2d 716.[10]

The holding below correctly followed *United States v. Biswell*, 406 U.S. 311 (1972). In that case, this Court found that warrantless inspections of a pawnshop owner for compliance with the Gun Control Act of 1968, 18 U.S.C. § 921, *et seq.*, posed only limited threats to the dealer's expectations of privacy: "When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business . . . will be subject to effective inspection." *Biswell*, 406 U.S. at 316. Similarly, licensed fish dealers, by electing to engage in a closely regulated business, are on notice that they are subject to reasonable and effective inspection under N.C. Gen. Stat. § 113-136(k). Moreover, those who fish, whether for pleasure or profit, are aware that fishing has a long history of being inspected. "Indeed, the expectation of finding the game warden looking over one's shoulder at the catch is virtually as old as fishing itself." *Lovgren v. Byrne*, 787

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[10] N.C. Gen. Stat. § 113-156 clearly indicates that inspections are a routine part of the licensing process. A licensed fish dealer must satisfy any other purchasing fish dealer that the fish were acquired in conformity with the law, and the statute mandates that it is ". . . unlawful for a fish dealer to purchase or sell or in any manner deal in fish except in conformity with the provisions of this section." N.C. Gen. Stat. § 113-156(c)(4). Further, upon application for a license, the fish dealer must establish a location where records will be available for inspection. "[R]ecords kept in connection with licensing, sale and tax requirements will be available for inspection when necessary." N.C. Gen. Stat. § 113-156(d). Consequently, in the context of the commercial sale of fish, inspections are predictable and expected.

F.2d at 865. Consequently, in the context of commercial fishing operations, particularly the commercial sale of fish, inspections are predictable and expected by the public.

Fifth, Petitioner complains there is no limitation on the frequency or duration of inspections. (Petition, p. 17). This contention is meritless, as *Burger* does not require enumeration of a certain number of inspections over a defined interval. As this Court noted in *Burger*, "Indeed, we have approved statutes authorizing warrantless inspections even when such statutes did not establish a fixed number of inspections for a particular time period. And we have suggested that, in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme." *Burger*, 482 U.S. at 711, n.21 (citations omitted). The statute, on its face, does not authorize searches of unreasonable frequency or duration, and Petitioner does not allege harassment.

Sixth, Petitioner urges that the statute improperly imposes a criminal penalty for refusing a warrantless inspection. (Petition, p. 17). This contention is specious. This Court has held that a statute may lawfully penalize one for resisting a warrantless search or inspection which complies with the Fourth Amendment. *United States v. Biswell*, 406 U.S. 311, 318 (1972).

Seventh, Petitioner contends that the "broad enforcement jurisdiction" of Fisheries Inspectors "creates a potential for the use of the warrantless search provisions to enforce other statutes or discover other criminal activity." (Petition,

p. 18). This contention should be rejected. This challenge to the "potential" application of the statute to others, like each contention discussed above, is improper in a facial challenge to this criminal prosecution. Further, the enforcement jurisdiction of Fisheries Inspectors is limited by N.C. Gen. Stat. § 113-136(b), and the scope of authorized inspections duly circumscribed. Petitioner does not allege that the inspectors came to his place of business in search of other criminal activity, or used the inspection of fish as a pretext for an unreasonable search of the premises.

Petitioner has stated no basis for granting the writ of certiorari; therefore, his Petition should be denied.

CONCLUSION

Petitioner has failed to meet the requirements of a facial challenge to N.C. Gen. Stat. § 113-136(k), as the Petition does not establish that there exists no set of circumstances under which the act would be valid. Further, the Supreme Court of North Carolina correctly determined that warrantless administrative inspections authorized by N.C. Gen. Stat. § 113-136 are appropriately circumscribed, and that the statute properly restricts the discretion of inspecting

officers in compliance with the Fourth Amendment. Therefore, the challenged provision on its face satisfies *New York v. Burger*, 482 U.S. 691 (1987), and the writ of certiorari should be denied.

Respectfully submitted,

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